169

SUPREME COURT OF THE UNITED STATES.

No. 201.

THOMAS A. WALTON, PLAINTIFF IN ERROR,

vs.

HENRY FITZHUGH AND DEWITT C. LITTLEJOHN, PARTNERS UNDER THE NAME OF FITZHUGH & LITTLEJOHN.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE NORTHERN DISTRICT OF OHIO.

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UNITED STATES OF AMERICA,
Northern District of Ohio.

At a stated term of the circuit court of the United States for the seventh circuit and northern district of Ohio, begun and held at the city of Cleveland, in said district, on the second Tuesday of the month of November, being the tenth day of that month, in the year of our Lord one thousand eight hundred and fifty-seven, and of the independence of the United States of America the eighty-second—

Present the honorable Hiram V. Willson, district judge, and one of the judges of said court—

Among the proceedings then and there had were the following, to wit:

HENRY FITZHUGH and DEWITT C. LITTLEJOHN, partners under the name and firm of Fitzhugh & Littlejohn,
vs.
THOMAS A. WALTON.
} No. 260. In assumpsit.

Be it remembered that heretofore, to wit, on the tenth day of July, in the year of our Lord one thousand eight hundred and fifty-six, came the said plaintiffs, by their attorneys, and filed in the clerk's office of said court a precipe and declaration herein, in the words and figures following, to wit:

CIRCUIT COURT OF THE UNITED STATES
For the Northern District of Ohio, ss:

July term, 1856.

HENRY FITZHUGH and DEWITT C. LITTLEJOHN, partners under the name of Fitzhugh & Littlejohn, citizens and residents of the State of New York,
vs.
THOMAS A. WALTON, a citizen and resident of the State of Ohio and the northern district thereof.
} In assumpsit.

Issue a summons in the said cause, returnable July 25th, 1856. Endorse suit brought on a contract, by which deft. promised to deliver to plffs. 1,987 $\frac{43}{60}$ bushels of wheat, for which plffs. paid to deft. the full contract price, to wit, $1,987 $\frac{43}{60}$ but which wheat deft. has failed to deliver, and refuses to deliver, to plffs.; also for goods sold and delivered, money lent by plffs. to deft., money had and rec'd, money paid, &c. Amount claimed, $1,987 70, with interest from June 23d, 1856. Damages, $4,000 00.

BACKUS & NOBLE, *Plffs. Att'ys.*

To the CLERK OF SAID COURT.

July 9th, 1856.

[REC. CCI, D. T., 1858.]—1

CIRCUIT COURT OF THE UNITED STATES
For the Northern District of Ohio, ss:

July term, 1856.

HENRY FITZHUGH and DEWITT C. LITTLEJOHN, partners under the name and style of Fitzhugh & Littlejohn, and citizens and residents of the State of New York,
vs.
THOMAS A. WALTON, a citizen and resident of the State of Ohio and the northern district thereof.
} Declaration in assumpsit.

Henry Fitzhugh and Dewitt C. Littlejohn, partners in trade under the name and style of Fitzhugh & Littlejohn, and citizens and residents of the State of New York, complain of Thomas A. Walton, a citizen of the State of Ohio, and of the northern district of Ohio, in a plea of assumpsit, for that whereas the plaintiffs, Henry Fitzhugh and Dewitt C. Littlejohn, heretofore, to wit, on the 23d day of June, A. D. 1856, at Cleveland, in the State of Ohio, to wit, in the northern district of Ohio, at the special instance and request of the defendant, Thomas A. Walton, bargained for and agreed to buy of and from the said defendant a large quantity, to wit, one thousand nine hundred and eighty-seven and $\frac{4}{6}\frac{3}{0}$ bushels of wheat, at and for the rate of one dollar per bushel and every bushel thereof. And thereupon, in consideration of the premises, and also in consideration of one thousand nine hundred and eighty seven and $\frac{4}{1}\frac{0}{0}\frac{0}{0}$ dollars, then and there paid by said plaintiffs to said defendant, the said defendant agreed to deliver, on demand, to these plaintiffs said one thousand nine hundred and eighty seven and $\frac{4}{6}\frac{3}{0}$ bushels of wheat; and although the plaintiffs, on the 24th day of June, 1856, at said Cleveland, and on the 27th day of June, 1856, at said Cleveland, and at all other times, at said Cleveland, have been ready to receive said wheat, and have demanded said wheat of and from said defendant, whereof the said defendant had notice, yet the said defendant, not regarding his said promise and undertaking, did not nor would deliver to plaintiff the said quantity of wheat so bought and paid for as aforesaid, or any other wheat whatsoever, but on the contrary thereof, the said defendant hath hitherto refused and still refuses so to do, to plaintiffs' damage two thousand dollars. And also for that whereas, at Cleveland, in the district aforesaid, in consideration that said plaintiffs, at the like special instance and request of the said defendant, had then and there contracted and agreed with him to buy and purchase of and from him, the said defendant, another large quantity, to wit, $1,987\frac{4}{6}\frac{3}{0}$ bushels, of good merchantable wheat, and to pay him therefor the sum of one dollar per bushel for each and every bushel thereof, and then and there faithfully promised plaintiffs to deliver the same to them, payment

having been first made therefor on request; and although plaintiffs afterwards, to wit, on the 23d day of June, A. D. 1856, paid to said defendant the sum of $1,987 70 for the price of said wheat, being the full price agreed upon in the bargain aforesaid, and although they have often and repeatedly since that time, to wit, on the 24th day of June, 1856, and on the 27th day of June, 1856, and at divers and other times since said 23d day of June, 1856, demanded of and from said defendant the said wheat, and have been then and there ready to receive the same, yet the said defendant hath refused to deliver the same or any part thereof to plaintiffs, and still refuses so to do, and the said last-mentioned wheat remains altogether undelivered to plaintiffs, to plaintiffs' damage two thousand dollars. And also for that whereas the said defendant, on the 23d day of June, 1856, at Cleveland, in the district aforesaid, was indebted to the said plaintiffs in the further sum of two thousand dollars, for the price and value of goods then and there bargained and sold by the plaintiffs to the defendant at his request; and in the further sum of two thousand dollars, for money then and there lent by the plaintiffs to the defendant at his request; and in the further sum of two thousand dollars, for money then and there paid by the plaintiffs for the use of the defendant, at the request of said defendant; and in two thousand dollars, for money then and there received by said defendant for the use of said plaintiffs; and in two thousand dollars, for money then and there paid to defendant by plaintiffs for goods bargained by defendant to plaintiffs, which defendant then and there refused to deliver to plaintiffs. And the defendant afterwards, to wit, on the 27th day of June, 1856, at said Cleveland, in said district, in consideration of the premises, promised to pay the said several sums of money in this declaration mentioned to the plaintiff on request; yet he hath disregarded his said promises, and hath not paid the said several sums of money, nor either of them, nor any part thereof, to said plaintiffs, although often requested so to do, to the damage of the plaintiffs four thousand dollars, and therefore they sue.

BACKUS & NOBLE,
Plaintiffs' Att'ys.

And thereupon, to wit, on the said tenth day of July, in the year of our Lord one thousand eight hundred and fifty-six, a writ of summons against the said defendant, Thomas A. Walton, was issued from the clerk's office of said court, in the words and figures following, to wit:

NORTHERN DISTRICT OF OHIO, *ss:*

The President of the United States of America, to the marshal of said district, greeting:

We command you to summon Thomas A. Walton, a citizen of and

resident in the State of Ohio, if he be found in your bailiwick, to be and appear before the judges of the circuit court of the United States for the northern district of Ohio aforesaid, at Cleveland, on the twenty-fourth day of July instant, to answer unto Henry Fitzhugh and Dewitt C. Littlejohn, partners under the name of Fitzhugh & Littlejohn, citizens of and residents in the State of New York, of a plea of assumpsit, damages four thousand ($4,000) dollars, and have you then and there this writ.

Witness the honorable Roger B. Taney, Chief Justice of the United States, this 10th day of July, 1856, and in the eighty-first year of the independence of the United States of America. [SEAL.]

Attest: F. W. GREEN, *Clerk.*"

And on the said writ of summons are the following endorsements, to wit:

"Suit brought on a contract, by which defendant promised to deliver to plffs. 1,987$\frac{42}{60}$ bushels of wheat, for which plffs. paid to defendant the full contract price, to wit, $1,987 42, but which wheat deft. has failed to deliver and refuses to deliver to plffs.; also for goods sold and delivered, money lent by plffs. to deft., money had and rec'd, money paid, &c. Am't claimed, $1,987 70, with interest from June 23d, 1856. Damages $4,000 00.

BACKUS & NOBLE, *Plffs. Att'ys.*"

"We, Guyles & Bash, acknowledge ourselves security for all costs for which the plaintiffs may be liable in this suit.

GUYLES & BASH."

And afterwards, to wit, on the sixteenth day of July, in the year of our Lord one thousand eight hundred and fifty-six, the said writ of summons was returned into the said clerk's office by said marshal with his return endorsed thereon as follows, to wit:

"Served this writ upon the within-named Thomas A. Walton, by personally delivering to him a true copy of this writ. July 16th, 1856.

J. W. FITCH,
U. S. Marshal N. D. Ohio.
By JAS. LAWRENCE, *Deputy.*"

And afterwards, to wit, on the second day of August, in the year of our Lord one thousand eight hundred and fifty-six, came the said defendant, Thomas A. Walton, by his attorneys, and filed in the clerk's office aforesaid his plea to said plaintiffs' said declaration, in the words and figures following, to wit:

CIRCUIT COURT OF THE UNITED STATES
For the Northern District of Ohio, ss:

July term, 1856.

HENRY FITZHUGH and DEWITT C. LITTLEJOHN, partners under the name of Fitzhugh & Littlejohn,
vs.
THOMAS A. WALTON. } In assumpsit.

And the said Thomas A. Walton comes and defends, &c., and says that he did not assume and promise in manner and form as the said plaintiffs have declared against him, and of this he puts himself upon the country; and the said plaintiffs do the like. &c.

By AXTELL & PRENTISS, *his Att'ys.*

And afterwards, to wit, at the July stated term of said court, in the year of our Lord one thousand eight hundred and fifty-six, this cause was continued.

And afterwards, to wit, at the September special term of said court, in the year of our Lord one thousand eight hundred and fifty-six, this cause was continued.

And afterwards, to wit, at the November stated term of said court, in the year of our Lord one thousand eight hundred and fifty-six, this cause was continued.

And afterwards, to wit, on the fourteenth day of February, in the year of our Lord one thousand eight hundred and fifty-seven, came the said plaintiffs, by their attorneys, and by consent of parties filed in said clerk's office their amended declaration herein, which is in the words and figures following, to wit:

Amended Narrative.

CIRCUIT COURT OF THE UNITED STATES
For the Northern District of Ohio, ss:

HENRY FITZHUGH and DEWITT C. LITTLEJOHN
vs.
THOMAS A. WALTON.

Henry Fitzhugh and Dewitt C. Littlejohn, partners in trade under the name and style of Fitzhugh and Littlejohn, and citizens and residents of the State of New York, complain of Thomas A. Walton, a citizen and resident of the State of Ohio and of the northern district thereof, in a plea of assumpsit, for that whereas the plaintiffs heretofore, to wit, on the twenty-first day of June, A. D. 1856, at Cleveland, in the State of Ohio, to wit, in the northern district of Ohio, at the special instance and request of the defendant, bargained for and agreed to buy of and from said defendant a large quantity, to wit, one thousand nine hundred and eighty seven and $\frac{12}{60}$ bushels

of wheat, at the rate of one dollar per bushel for each and every bushel thereof, for which wheat payment was to be made by plaintiffs to defendant, on Monday, the 23d day of June, A. D. 1856, and which wheat was to be delivered to plaintiffs by defendant, free of all charges of storage, shipping, and every other charge, on board of a vessel to be provided by plaintiffs, at any time when plaintiffs should provide such vessel, up to the 27th day of June, A. D. 1856; and therefore, on the said 23d day of June, A. D. 1856, plaintiffs, at the district aforesaid, did pay to defendant the sum of one thousand nine hundred and eighty-seven and $\frac{70}{100}$ dollars, being the price agreed upon as aforesaid, which defendant then and there accepted and received in full payment for said wheat, and then and there, in consideration of the premises, promised to deliver said wheat to plaintiffs, free of all charges of storage, shipping, and every other charge, upon and on board of such vessel as plaintiffs should offer for the reception of said wheat, at any time up to the 27th day of said June, A. D. 1856; and although the plaintiffs afterwards, to wit, on the 24th day of June, A. D. 1856, and on the 27th day of June, 1856, and at divers other days and times from said 23d day of June, 1856, to said 27th day of June, 1856, were ready with a vessel to receive, and then and there offered to receive, said wheat, and demanded that said wheat should be delivered to them in accordance with the agreement aforesaid, yet the said defendant did not nor would deliver to plaintiffs the said quantity of wheat so bought and paid for as aforesaid, or any other quantity of wheat, then and there at all times refused to deliver the said wheat to plaintiffs, in accordance with the contract aforesaid, and hitherto hath refused to deliver the same, to plaintiffs' damage two thousand dollars. And also for that whereas, at Cleveland, in the district aforesaid, in consideration that said plaintiffs, on the 21st day of June, 1856, at the like special instance and request of said defendant, had then and there contracted and agreed with him, the defendant, to buy and purchase of and from him another large quantity, to wit, 1,987$\frac{2}{60}$ bushels, of good merchantable wheat, and to pay him therefor the sum of one dollar per bushel for each and every bushel thereof, on the 23d day of June, 1856, said defendant then and there promised to deliver the same to plaintiffs, free of storage, at any time when the plaintiffs should demand the same, up to the 27th day of June, A. D. 1856; and although the plaintiffs did afterwards, to wit, on the said 23d day of June, 1856, pay to said defendant the sum of $1,987 70, being one dollar per bushel for each and every bushel of said wheat so agreed to be delivered as aforesaid; and although said plaintiffs have often, to wit, on the 24th day of June, 1856, and on the 27th day of June, 1856, and at divers other times since said 23d day of June, and prior to said 27th day of June, demanded said wheat of and from said defendant, and have been ready then and there to receive the same, yet the said defendant hath refused to deliver the

same to plaintiffs, or any part thereof, and still refuses so to do, to plaintiffs' damage two thousand dollars. And also for that whereas the said defendant, on the twenty-third day of June, A. D. 1856, at Cleveland, in the northern district of Ohio, in consideration of nineteen hundred and eighty-seven $\frac{70}{100}$ dollars, then and there paid to him by plaintiffs, made his order in writing, and directed the same to H. N. Gates, and thereby required the said H. N. Gates to deliver to Guyles & Bash or order 1,987$\frac{43}{60}$ bushels of wheat, free of storage, at any time thereafter up to the 27th of the month then instant, and then and there delivered the same to said Guyles & Bash, who were then and there acting as agents for and in behalf of said plaintiffs; and the said order was then and there, to wit, on the 24th day of June, 1856, at said Cleveland, presented by said Guyles & Bash, then and there acting for said plaintiffs, to said H. N. Gates for acceptance, and demand of the wheat mentioned in said order, then and there made under authority and by virtue of said order made of said H. N. Gates, who then and there refused to accept said order or to deliver said wheat, of all which said defendant then and there had due notice; in consideration of which and of the premises the said defendant afterwards, to wit, on the 28th day of June, A. D. 1856, at said Cleveland, promised to pay said plaintiffs the sum of two thousand dollars, the value of said wheat, on request; yet he hath disregarded his promises, and hath not paid the said sum of two thousand dollars to plaintiffs, or any part thereof, to plaintiffs' damage two thousand dollars. And also for that whereas the plaintiffs heretofore, to wit, on the 27th day of February, A. D. 185 , at said Cleveland, at the special instance and request of the defendant, bargained for and agreed to buy of and from said defendant another large quantity, to wit, one thousand nine hundred and eighty-seven and $\frac{43}{60}$ bushels of wheat, at and for the rate of one dollar per bushel for each and every bushel thereof, to be delivered at any time when plaintiffs should demand the same, free of storage, up to the 27th day of said June; and therefore, in consideration of the premises, and also in consideration of one thousand nine hundred and eighty-seven and $\frac{70}{100}$ dollars, then and there paid by said plaintiffs to said defendant, said defendant agreed to deliver to plaintiffs, free of storage, at any time when plaintiffs should be ready to receive the same, up to the 27th day of June, 1856, said wheat; and although the plaintiffs were on the 24th day of June, 1856, ready to receive said wheat, and on said 24th day of June, 1856, demanded said wheat of and from said deft., and have often demanded the same since said 24th day of June, 1856, and have ever since said date been ready to receive the same, to wit, at Cleveland, whereof the said defendant had due notice, yet the said defendant, not regarding his said promise and undertaking, did not nor would deliver to plaintiffs the said quantity of wheat so bought and paid for as aforesaid, but, on the contrary, the said defendant hath hitherto refused to deliver said wheat, or any part

thereof, and still refuses so to do, to the damage of plaintiffs two thousand dollars. And also for that whereas the said defendant, on the 23d day of June, 1856, at Cleveland, in the district aforesaid, was indebted to the said plaintiffs in the further sum of two thousand dollars, for the price and value of goods then and there bargained and sold by the plaintiffs to the defendant at his request; and in the further sum of two thousand dollars, for money then and there lent by the plaintiffs to the defendants at his request; and in the further sum of two thousand dollars, then and there paid by the plaintiffs for the use of the defendant, at the request of said defendant; and in two thousand dollars, for money then and there received by said defendant for the use of said plaintiffs; and in two thousand dollars, for money then and there paid to defendant by plaintiffs for other goods bargained by defendant to plaintiff, which defendant then and there refused to deliver to plaintiff. And the said defendant afterwards, to wit, on the 29th day of June, 1856, at said Cleveland, in said district, in consideration of the premises, promised to pay the said several sums of money in this declaration mentioned to the plaintiffs on request, yet he hath disregarded his said promises, and hath not paid the said several sums of money, nor either of them, nor any part thereof, to said plaintiffs, although often requested so to do, to the damage of the plaintiffs four thousand dollars, and therefore they sue.

RANNEY, BACKUS & NOBLE,
Plaintiffs' Att'ys.

And afterwards, to wit, on the eleventh day of March, in the year of our Lord one thousand eight hundred and fifty-seven, came the said defendant, by his attorneys, and filed in the clerk's office aforesaid his plea to said plaintiffs' said amended declaration, in the words and figures following, to wit:

Plea.

CIRCUIT COURT OF THE UNITED STATES
For the Northern District of Ohio.

HENRY FITZHUGH and DEWITT C. LITTLEJOHN
vs.
THOMAS A. WALTON.

And the said defendant comes and defends, &c., and says that he did not assume and promise in manner and form as the plaintiffs have declared against him, and of this he puts himself upon the country; and the said plaintiffs do the like, &c.

S. B. AXTELL & L. PRENTISS,
Att'ys for Deft.

And afterwards, to wit, at the February special term of said court, in the year of our Lord one thousand eight hundred and fifty-seven, this cause was continued to the next July stated term.

And afterwards, to wit, at the July stated term of said court, in the year of our Lord one thousand eight hundred and fifty-seven, this cause was continued to the next November stated term.

And afterwards, to wit, on the second day of December, in the year of our Lord one thousand eight hundred and fifty-seven, being at the November stated term of said court in said year, the following entry was made on the journal of said court, to wit:

HENRY FITZHUGH and DEWITT C. LITTLEJOHN, partners, &c., vs. THOMAS A. WALTON. } No. 260. In assumpsit.

This day came the said parties, by their attorneys, and thereupon came a jury, to wit: John Perry, Phineas Stewart, J. W. Brown, James Swineford, Stoughton Bliss, J. H. Strong, E. Byington, Jacob Mitchell, F. C. Babbitt, H. K. Miner, E. M. Seegur, and Anson Smith, who were duly empanelled and sworn to speak the truth upon the issue joined between the parties, and the evidence not being closed, were adjourned until to-morrow morning at 9 o'clock.

And afterwards, to wit, on the third day of December, in the year and at the term of said court last above mentioned, the following entry was made on the journal of said court:

HENRY FITZHUGH and DEWITT C. LITTLEJOHN, partners, &c. vs. THOMAS A. WALTON. } No. 260. In assumpsit.

This day came the parties aforesaid, by their attorneys, and also the jurors empanelled and sworn herein on yesterday, and the arguments of counsel not being concluded, they were adjourned until to-morrow morning at 9 o'clock.

And afterwards, to wit, on the fourth day of December, in the year and at the term of said court last above mentioned, the following entry was made on the journal of said court, to wit:

HENRY FITZHUGH and DEWITT C. LITTLEJOHN, partners, &c., vs. THOMAS A. WALTON. } No. 260. In assumpsit.

This day came the said parties, by their attorneys, and also the jurors empanelled and sworn herein on Wednesday last, and thereupon the said jurors, upon their oaths, do say that the said defendant did assume and promise in manner and form as the said plaintiffs have complained against him, and they assess the damages of the plaintiffs by reason of the premises to twenty-one hundred and fifty-one dollars and two cents, ($2,151\frac{2}{100}$,) and thereupon the

defendant moved the court to set aside said verdict and to grant him a new trial.

And afterwards, to wit, on the sixth day of January, in the year of our Lord one thousand eight hundred and fifty-eight, being at the said November stated term of said court first above mentioned, the following entry was made on the journal of said court, to wit:

HENRY FITZHUGH and DEWITT C. LITTLEJOHN vs. THOMAS A. WALTON. } No. 260. In assumpsit.

Verdict for plaintiffs, December 4th, 1857, for $2,151 02.

And now comes the defendant, by his attorney, and withdraws his motion heretofore filed for a new trial of this cause. Therefore it is considered by the court that the plaintiffs recover of the said defendant the said sum of two thousand one hundred and fifty-one dollars and two cents, ($2,151 02,) their damages aforesaid in form aforesaid assessed by the jury on the fourth of December, A. D. 1857, and also their costs in this behalf expended, taxed to

And the said defendant, by his attorney, having, on the trial of this cause, tendered his bill of exceptions to the rulings of the court on the several points therein set forth, and to the refusal of the court to charge the jury as asked by the defendant, prays that the said bill of exceptions be signed and sealed by the court, which is now accordingly done, and it is ordered that the same be made a part of the record of this case, which said bill of exceptions is as follows, to wit:

CIRCUIT COURT OF THE UNITED STATES
For the Northern District of Ohio.

HENRY FITZHUGH and DEWITT C. LITTLEJOHN vs. THOMAS A. WALTON. } Assumpsit.

Be it remembered that on the trial of this cause in said court, at the November term thereof, 1857, the plaintiffs, to maintain the issue on their part, gave evidence tending to show that, on the 20th day of June, 1856, the plaintiffs, through their agents, Messrs. Guyles & Bash, of Cleveland, Ohio, entered into a contract with the defendant for the purchase of him of 1,987$\frac{2}{60}$ bushels of wheat, at the price of one dollar per bushel, to be paid for on the 23d day of the same month, which wheat was in the warehouse of one H. N. Gates, in said Cleveland. They also gave evidence tending to show that, by the terms of said contract, said wheat was to be delivered to the plaintiffs "free, on board" of such vessel as the plaintiffs should provide between the 24th and 27th days of June (inclusive) then instant; and that on said 24th day of June the said Guyles & Bash provided a vessel and demanded said wheat of the defendant, which was not delivered, for the reason that it had

been destroyed by fire on the night of said 23d or morning of the 24th of June, before business hours. The plaintiffs also introduced the evidence of several witnesses, who were commission merchants at said Cleveland, (the first of whom was Arthur Hughes,) to show that the words free on board, when used in a contract for the sale of grain, had, by usage among commission merchants, acquired a meaning well understood by commission merchants, and by whom the plaintiff gave evidence, tending to show that the said words, when used in a contract for the sale of grain, required the seller to deliver the property sold on board of vessel free of all charges of every kind and description; and thereupon the plaintiffs, by their attorneys, inquired of the said Hughes, as such witness, "At whose risk property thus contracted or sold remained until the delivery thereof?" To which question the defendant, by his attorney, then and there objected, which objection was overruled by the court, but decided that the witness might give testimony of what the custom was in the particular referred to, and how it was understood by the trade, but could not give evidence of the construction of the contract or the legal effect of a usage. And said witness, in answer to said question, stated that by such contract of sale the seller was bound to deliver on board of vessel at all events, and that until such delivery was made the grain remained the property of the seller and at his risk, to which answer the defendant also objected; and to the said ruling and decision of the court in overruling said objection to the said question of the plaintiffs, and permitting said answer to be given, the defendant, by his attorneys, then and there excepted; and that said exception might be allowed, and asked that this his bill of exceptions in that behalf might be signed and sealed by the court, and made a part of the record in said cause, which is signed and sealed accordingly, and it is ordered by the court that this bill of exceptions be made a part of the record of said cause.

H. V. WILLSON, *Dist. Judge.* [SEAL.]

Bill of Exceptions.

HENRY FITZHUGH and DEWITT C. LITTLEJOHN
vs.
THOMAS A. WALTON.
} Assumpsit.

Be it remembered that, on the trial of this cause in the circuit court of the United States for the northern district of Ohio, at the November term thereof, 1857, the said plaintiffs, to maintain the issue on their part, gave evidence tending to prove that, on the 20th day of June, 1856, the said plaintiffs, who are citizens and residents of the State of New York, through Messrs. Guyles & Bash, their duly authorized agents at Cleveland, Ohio, entered into a contract with the defendant for the purchase from him of 1,987$\frac{3}{60}$ bushels of wheat, at the price of one dollar per bushel, payable on the 23d day of June then instant, and the wheat to be delivered to the

plaintiffs free on board of such vessel as they might provide, in the port of Cleveland, at any time between the 24th and 27th, inclusive, of the same month; that this contract was made with the defendant by Mr Bash, acting for the plaintiffs, and on behalf of the firm of Guyles & Bash, and with the particulars of which his partner (Mr. Guyles) was not made acquainted; that on the 23d day of said June Mr Guyles went to the office of the defendant, and there paid him the purchase price for the aforesaid quantity of wheat, when the defendant delivered to him a bill of the same, receipted, and a delivery order upon H. N. Gates, a warehouseman at said port, which said papers read as follows:

CLEVELAND, *June* 23, 1856.

Messrs. Guyles & Bash, bought of T. A. Walton,
1,987 $\frac{2}{60}$ bus. wheat, at $1, ... $1,987 70
Rec'd pay't, T. A. WALTON.

CLEVELAND, *June* 23*d*, 1856.

MR. H. N. GATES:

Please deliver to Guyles & Bash or order nineteen hundred and eighty-seven $\frac{2}{60}$ bus. wheat, free of storage, up to the 27th inst.
1,987 $\frac{2}{60}$. T. A. WALTON.

That said Guyles, after examining the papers, expressed his dissatisfaction with the terms of the order, as neither conforming to the usual course of the trade or to the terms of the contract, as he had understood them from Mr. Bash, and requested the defendant so to change the paper as to make it stipulate for the delivery of the wheat free on board a vessel at any time from the 24th to the 27th of the month; but upon being assured by the defendant that it conformed to the contract as made with Mr. Bash, and upon the defendant's promise to make it right if it should not be satisfactory to Mr. Bash, Mr. Guyles was inclined to take the papers to submit to the examination of Mr. Bash, which he accordingly did; and Mr. Bash, not being satisfied with the order, but claiming the contract to have been as hereinbefore stated, immediately went to the office of the defendant, and requested the change to be made, which the defendant refused to do, claiming that the paper already expressed the terms of the verbal contract as made between himself and Bash. That an altercation then ensued, in which the parties maintained their respective positions, and which was terminated by Bash leaving the office with the papers, and making no demand for the return of the money, but to an inquiry made by the defendant, as to whether he was satisfied, replying, that he should never be satisfied until he had the wheat free on board as it had been sold to him. That on the 24th of the month, Messrs. Guyles & Bash, having provided a vessel for receiving the wheat, demanded its delivery or a return of the money, which was refused by the de-

fendant, upon the ground that it had been destroyed by fire after the money was paid, and on the night of the 23d, and that this demand was repeated at other times between the 24th and 27th, both upon the defendant and the warehouseman, Mr Gates, with a like refusal, and for the same reason. The plaintiffs also gave in evidence, for the purpose of further maintaining the issue on their part, the testimony of several commission merchants engaged in the business of buying and selling grain at said port of Cleveland, tending to show that the usual course of business, when wheat was received at said port, was for the owner to put it in store for a certain length of time, and to cause it to be insured for the same time, the compensation to be paid by him to the warehouseman, imposing the obligation upon the latter to weigh it when it was received, and again when he delivered it to a purchaser, being responsible to the owner for any deficiency. That it was usually sold to be delivered free on board, at any time within the period for which the storage had been paid and the insurance effected, to suit the convenience of the purchaser: and that the term "free on board," as used and understood amongst those engaged in that trade, entitled the purchaser, at the stipulated time, to have the wheat weighed out and delivered on board a vessel free of all charge whatever, and bound the seller to make such delivery at all events at his own risk and charges, and that until such delivery was made the grain remained the property of the seller and at his risk. And it was further proved, that both the defendant and said Guyles & Bash were commission merchants, engaged in the business of buying and selling grain at the port of Cleveland. The plaintiffs further gave evidence tending to prove that, at the time the contract was made, nothing was said as to whether the wheat was insured or not, and that at no time had said Guyles & Bash ever seen said wheat, nor did they know whether said defendant had any wheat at said warehouse or not; unless said defendant said his wheat was at said warehouse, and whether he did so say or not, was not recollected by said Bash. The defendant, to maintain the issue on his part, gave evidence tending to show that the contract as made for the sale of the wheat was such as is expressed in the order upon said Gates, and the bill acknowledging the receipt of payment therefor, and that there was no other or further agreement as to the sale or delivery thereof. That the wheat was not insured at the time the money was paid, on the 23d of June, and that he so informed said Guyles & Bash, and that he refused to insert in the order or bill free of insurance or free on board. That the wheat was put in the warehouse of said Gates on the 9th of June, 1856, in a bin by itself, and had never been mixed with any other wheat while it was there; that it was weighed when it was put there, and that the quantity was 1,987⅔ bushels; and that at the time the contract was made with Bash, upon inquiry made by him as to how much wheat the defendant had, he informed Bash that he had that amount, and that it was in said warehouse.

The defendant also introduced testimony to show that the meaning of the phrase free on board, as understood by commercial men in the buying and selling of grain, was, that it required the seller to pay all charges on it up to the time of the delivery, and including the charges for delivery, and that this was the only difference between a contract where the phrase was used and one where it was not; that it imposed no additional obligation upon the seller, and that an order given by the seller upon the warehouseman was the ordinary method of delivering grain. That when such an order is presented, the warehouseman delivers the grain to the purchaser, charging the storage to the seller, unless otherwise directed, and that the charge for storage includes the cost and charges of weighing in, storing, and delivering on board a vessel, and that the warehouseman is liable for any deficiency in case the grain falls short on being weighed out. That the warehouseman performs all the labor in making the delivery, leaving the seller nothing further to do if the order is obeyed: and that these orders frequently pass from hand to hand, by endorsement or delivery, in the buying and selling of grain. That the wheat in question would have been delivered upon the presentation of the order to Mr. Gates, had it not been burned up: and that the warehouse in which it was stored, as well as the wheat, was burned in the night of the 23d of June, and before the order had been presented.

The court instructed the jury that the most material inquiry in the case was to determine which of the parties was invested with the title to the wheat at the time it was destroyed. That if, under the circumstances, the title had passed to the plaintiffs by the contract and payment of the price, the loss was theirs, and there could be no recovery: but if at that time it was still in the defendant, the amount paid, with interest upon it, might be recovered. That for certain purposes, in all cases, the rights of the parties are fixed as soon as the contract is made, but that, as a general principle, if anything material, involving labor, risk, or expense, remains to be done by the seller, according to the terms of the contract, the transaction is not so far complete as to vest the title in the purchaser, until such stipulations are performed by the seller. That if the things sold consist in quantity, and are sold by weight, number, or measure, they are not at the risk of the purchaser until they have been weighed, numbered, or measured, and separated from all others; and that in this case, if the jury should find the contract to have been such as it is claimed to have been by the plaintiffs, and that the obligation remained with the defendant to weigh out and deliver on board a vessel the stipulated quantity of wheat, at his own risk and expense, and that this had not been done at the time it was destroyed, the sale was not so far complete as to vest the title in the plaintiffs, and that in such case the verdict should be for them. But if the jury should find that the wheat, the subject of sale, was in a bin by itself, and understood by the

parties, and conceded to amount to the stipulated quantity, and in that condition was all bought by the plaintiffs, and nothing further material remained for the defendant to do, the sale was perfect, and the title passed as soon as the contract was made, and the verdict should be for the defendant.

To which charge and ruling of the court the defendant, by his counsel, excepted, and asked the court to charge the jury as follows:

1. That if the jury shall find that it was the intention of the defendant to sell and the intention of the plaintiffs to buy all the wheat which the defendant had in the warehouse in question, and that the wheat was separate from all other wheat, each party supposing there was the quantity of wheat stated by the defendant and named in the bill of sale and order, the fact that the plaintiffs might be entitled to have the same weighed or measured at a subsequent time, if they saw fit, would not prevent the title to the wheat passing by the sale to the plaintiffs.

2. That if the jury shall find that by the terms of the contract of sale the wheat was to remain in the warehouse in question, free of storage and every other charge, up to the 27th of June, and to be delivered on board of any vessel which the plaintiffs might furnish within that time, the fact that it was so to remain and be so delivered would not prevent the title to it passing by the sale to the plaintiffs.

3. That if the jury shall find, under the instructions already given, that the title to the wheat did pass by the sale to the plaintiffs, they cannot recover in this case, even if the jury shall find that by the terms of the contract the wheat was to remain in the warehouse in question, free of storage and every other charge, up to the 27th of June, and to be delivered within that time on board of any vessel that the plaintiffs might furnish. That at most, in such case, the defendant would only be liable as bailee of the wheat, and that whatever his duties and liabilities as bailee might be, no recovery can be had against him in this case for any breach of his duties as bailee.

4. That if the jury shall find, under the instructions already given, that the title to the wheat passed to the plaintiffs by sale, Gates, from the time of sale, became the agent of the plaintiffs, and held the wheat as warehouseman for them, which charge the court gave as requested.

5. That if the jury shall find from the testimony that it was agreed between the parties that the wheat was to be taken by the plaintiffs at the weight of the same as weighed in by the warehouseman, the title to the wheat passed by the sale to the plaintiffs, notwithstanding the jury may find that the defendant agreed to deliver the wheat "free on board of vessel;" which charge the court refused to give, but charged the jury that if the quantity of the wheat was agreed upon, no weighing or measuring would be necessary to pass the title; but that if, by the contract, the defend-

ant agreed to deliver the wheat "free on board of vessel," the title would not pass till it was so delivered.

And upon the said first, second, third, fourth, and fifth propositions so requested to be given in charge to the jury, the court declined to give specific instructions, excepting as hereinbefore stated, but declared the rules of law applicable to the case to be those already given to the jury, unless those rules were varied by an existing general and well-established usage of trade; and that wherever there is a uniform usage in a particular trade or business, the parties are presumed to have contracted in reference to such usage, unless it be expressly excluded by them, or unless it be inconsistent with the actual terms of the agreement.

To all which refusals, instructions, and rulings of the court, excepting as to the fourth proposition, the defendant excepted, and prays that this his bill of exceptions in that behalf might be allowed, which is accordingly done, and upon his motion the same is ordered to be made a part of the record in this cause.

H. V. WILLSON, *Dis. Judge.* [SEAL.]

And afterwards, to wit, on the eleventh day of January, in the year of our Lord one thousand eight hundred and fifty-eight, came the said defendant, by his attorney, and filed in the clerk's office of said court his writ of error, which is in the words and figures following, to wit:

SUPREME COURT OF THE UNITED STATES.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the judges of the circuit court of the United States for the seventh circuit and northern district of Ohio, greeting:

Because in the record and proceedings, and also in the rendition of a judgment in a plea which is in the said circuit court before you, between Henry Fitzhugh and Dewitt C. Littlejohn, partners under the name of Fitzhugh & Littlejohn, plaintiffs, and Thomas A. Walton, defendant, a manifest error hath happened, to the great damage of the said Thomas A. Walton, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf—you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the first Monday in the month of December next, in the said Supreme Court then and there to be held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that

error what of right and according to law and custom of the United States should be done.

Witness the honorable Roger B. Taney, Chief Justice of the said Supreme Court of the United States, this eleventh day of January, in the year of our Lord one thousand eight hundred and fifty-eight, and of the independence of the United States of America the eighty-second.

[SEAL.]

Attest: F. W. GREEN, *Clerk.*

And on the said eleventh day of January, in the year of our Lord one thousand eight hundred and fifty-eight, the following citation to defendants in error herein was filed in the clerk's office aforesaid, to wit:

THE UNITED STATES OF AMERICA,
Supreme Court of the United States.

To Henry Fitzhugh and Dewitt C. Littlejohn, greeting:

Whereas Thomas A. Walton has obtained the allowance of our writ of error, to the judges of the circuit court of the United States, seventh circuit and northern district of Ohio directed, to remove into the said Supreme Court, to be holden at the city of Washington on the first Monday in the month of December next, the record of a certain plaint, process, proceedings, and judgment in an action of assumpsit, wherein you, the said Henry Fitzhugh and Dewitt C. Littlejohn, in that action lately recovered against the said Thomas A. Walton the sum of twenty-one hundred and fifty-one dollars and two cents ($\$2{,}151\frac{2}{100}$) damages and costs, as by the said record in in the said circuit court remaining appears, in which said record and proceedings, and also in the rendition of the judgment thereupon, manifest error hath intervened, as by the said Thomas A. Walton we are informed, and our said writ of error granted, issued, and allowed as aforesaid, for the purpose of correcting the errors aforesaid alleged, if any there be—you are therefore hereby commanded and cited to be and appear before the judges of the said Supreme Court, at the city of Washington, at the next term of said court, to be holden on the first Monday in the month of December next, to have the errors aforesaid corrected, and the judgment of our said Supreme Court thereupon.

Witness the honorable Roger B. Taney, Chief Justice of the United States of America, this eleventh day of January, in the year of our Lord one thousand eight hundred and fifty-eight, and of the independence of the United States of America the eighty-second.

H. W. WILLSON,
U. S. Dis. Judge and ex-officio Cir. Judge.

On the said citation is the following endorsement, to wit:

The within citation served upon us this day by a true copy thereof being delivered to us.

RANNEY, BACKUS & NOBLE,
Att'ys for Defts. in Error.

Cleveland, June 13, '58.

And on the 11th day of January, in the year of our Lord one thousand eight hundred and fifty-eight, the following bond on error was filed herein:

CIRCUIT COURT OF THE UNITED STATES
For the Seventh Circuit and Northern District of Ohio.

THOMAS A. WALTON
vs.
HENRY FITZHUGH and DEWITT C. LITTLEJOHN. } In error.

Know all men by these presents, that we, Thomas A. Walton, William Warren, and John Outhwait, are held and firmly bound unto the above-named Henry Fitzhugh and Dewitt C. Littlejohn, in the sum of five thousand dollars, to be paid to the said Henry Fitzhugh and Dewitt C. Littlejohn, their executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated at the city of Cleveland, this eighth day of January, in the year one thousand eight hundred and fifty-eight.

Whereas the above-named Thomas A. Walton hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the suit wherein the said Henry Fitzhugh and Dewitt C. Littlejohn are plaintiffs, and the said Thomas A. Walton defendant, by the circuit court of the United States for the seventh circuit and northern district of Ohio:

Now, therefore, the condition of this obligation is such, that if the above-named Thomas A. Walton shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his pleas, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

T. A. WALTON, [SEAL.]
JOHN OUTHWAITE, [SEAL.]
WILLIAM WARREN, [SEAL.]

Sealed and delivered in presence of—
JAS. D. CLEVELAND.

Approved by me this eleventh day of January, A. D. 1858.
H. V. WILLSON, *U. S. Dis. Judge.*

On the second day of December, in the year of our Lord one thousand eight hundred and fifty-seven, the deposition of J. H. Gates, taken before Perry Prentiss, a notary public in and for the

county of Cuyahoga, in the State of Ohio, on behalf of the defendant, was read during the trial of this cause, and which deposition and the exhibits thereto attached are in the words and figures following, to wit:

COURT OF THE UNITED STATES
For Northern District of Ohio.

HENRY FITZHUGH and DEWITT C. LITTLEJOHN vs. THOMAS A. WALTON. } Assumpsit.

Depositions will be taken in this case by the defendant at the office of L. Prentiss, esq., in the city of Cleveland, Ohio, on the 18th day of July, 1857, between the hours of 8 and 11 o'clock a. m. of said day.

AXTELL & PRENTISS,
Att'ys for Defts.

To Messrs. RANNEY, BACKUS & NOBLE,
Att'ys for Plffs.

July 17, 1857.

(Endorsed:) Rec'd copy of the within notice. July 17, 1857.
RANNEY, BACKUS & NOBLE,
Att'ys for Plffs.

The deposition of a witness, taken and to be used in evidence in a certain action now pending in the circuit court of the United States for the northern district of Ohio, wherein Henry Fitzhugh and Dewitt C. Littlejohn are plaintiffs, and Thomas A. Walton is defendant, on the part of the defendant.

Present, C. W. Noble, esq., att'y for plffs.
S. B. Axtell, esq., " deft.

Julian H. Gates, now in the city of Cleveland, in the State of Ohio, being duly sworn, deposes and says, in answer to

1st question by S. B. Axtell, att'y for said defendant, says; Where is your place of residence, and what is your business at the present time, and where employed?

Ans. I reside at Cleveland, and am now clerk on the propeller Michigan, running between Chicago and Ogdensburgh, and expect to continue in that business during the remainder of the season. I cannot tell when I shall be in this port again.

By same. In what business were you engaged during the summer of 1856, and where, and for whom were you employed?

Ans. I had charge of my father's grain warehouse in the city of Cleveland, on the west side of the river.

By same. Please state whether the defendant, T. A. Walton, at any time during the month of June, 1856, had in store in said warehouse any quantity of wheat, and if so, where was it put in

The within citation served upon us this day by a true copy thereof being delivered to us.

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Att'ys for Defts. in Error.

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Whereas the above-named Thomas A. Walton hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the suit wherein the said Henry Fitzhugh and Dewitt C. Littlejohn are plaintiffs, and the said Thomas A. Walton defendant, by the circuit court of the United States for the seventh circuit and northern district of Ohio:

Now, therefore, the condition of this obligation is such, that if the above-named Thomas A. Walton shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his pleas, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

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Ans. I reside at Cleveland, and am now clerk on the propeller Michigan, running between Chicago and Ogdensburgh, and expect to continue in that business during the remainder of the season. I cannot tell when I shall be in this port again.

By same. In what business were you engaged during the summer of 1856, and where, and for whom were you employed?

Ans. I had charge of my father's grain warehouse in the city of Cleveland, on the west side of the river.

By same. Please state whether the defendant, T. A. Walton, at any time during the month of June, 1856, had in store in said warehouse any quantity of wheat, and if so, where was it put in

said warehouse, and what quantity was there in store; how long did it remain there, and what became of it?

Ans. He had a canal boat load in the warehouse, consisting of nineteen hundred and eighty-seven bushels (1,987) and $\frac{4}{8}\frac{2}{0}$. It was put into the warehouse June 9, 1856, and was taken from the canal boat "Convoy." The wheat remained there till the night of the 23d of June, or the morning of June 24th, at which time the warehouse and the wheat was burned up.

By same. Where did the fire that consumed the wheat originate?

Ans. The fire originated in the rectifying establishment of Barney, Corning & Co., situate at the north of the warehouse, where the wheat was stored.

By same. When, that is, how long before the burning did you see the wheat?

Ans. I saw the wheat on the 23d day of June, 1856.

By same. Who received the wheat from the canal boat into the warehouse? How was the quantity ascertained, and by whom, and in what part of the warehouse and in what manner was the wheat stored.

Ans. I received the wheat into the warehouse and weighed it. It was stored in the south part of the warehouse, on the second floor, in a bin by itself.

By same. State whether any other wheat was put in the same bin, or whether this wheat was mingled with other wheat in any manner while it remained in said warehouse.

Ans. There was never any other wheat put in the bin with it, nor was it in any manner mingled with other wheat while it remained there.

By same. What was the business of Mr. Walton, the deft., during the summer of 1856, and how long had he been in the same business in Cleveland?

Ans. He was in the forwarding and commission business. I have known of his being in the business for ten years.

By same. In what business were Messrs. Guyles & Bash, of the city of Cleveland, engaged during the year 1856, and how long have you known them to have been in the same business?

Ans. They were in the forwarding and commission business. I have known of their being so engaged for two or three years.

By same. You have stated that you were employed for your father, and had charge of the warehouse in 1856. State what was the business of your father at that time.

Ans. He was in the forwarding and commission business. He also elevated and stored grain and rolling freight.

By same. What were your duties in the warehouse, and how long had you been in the discharge of them?

Ans. I had charge of the warehouse, kept the book, and also looked to the receipt of grain and weighing it in and out. I went into that employment about the fifth of April, 1856, and continued till the time of the fire.

Same. State whether you had, during your employment there, received grain in store for Messrs. Guyles & Bash, or delivered grain on orders of other persons to them, previous to the fire, and if so, when and how often?

Ans. I have received corn and wheat; two boat loads of wheat and one boat load of corn. I think I delivered them some corn on other persons' order, and by reference to the order which I have, I find that I delivered corn to them on the order of T. A. Walton to the amount of two thousand and ten $\frac{1}{5}\frac{3}{8}$ bushels, May 13, 1856. (A copy of the order referred to is hereto attached, marked "Exhibit A.")

Q. by same. Can you state whether the corn mentioned in your last answer was delivered to them personally or on board of vessel?

Ans. It was delivered to them on board of vessel, on presentation of the order by the captain of the vessel.

Q. by same. Upon the presentation of an order for the delivery of grain to a warehouseman, what act or duty in the delivery of the same by the course of business in your father's warehouse, or the usage of warehousemen and commission merchants in the city of Cleveland, devolves upon the seller or drawer of the order?

Ans. By our practice, the seller or drawer of the order has nothing to do with the delivery, but the warehouseman puts it on board of vessel or canal boat. The charges for storing are charged over to the owner, unless otherwise specified in the order. So far as I know, that is the usage of the warehousemen and commission merchants in Cleveland. By "owner" I mean the person from whom I received it.

Q. by same. What evidence have you that the wheat about which you have testified was received in store on the 9th of June, and stored as stated by you? State all you know about it.

Ans. I recollect the time, for the reason that my attention was called to it shortly after the fire, and also by reference to the books.

By same. State if you can, whether, at the time of the fire, there was any other wheat than the 1,987$\frac{4}{6}\frac{2}{0}$ bushels in your father's warehouse, also whether there was, on the said 9th day of June, or at any time between that day and the time of the fire, any other wheat in the warehouse.

Ans. There was no other wheat in the warehouse at the time of the fire, and no other wheat was received between the 9th of June and the time of the fire, and there was no other wheat in the warehouse on the 9th day of June.

Q. by same. State whether either Guyles or Bash called at your warehouse, within a few days previous to the fire, to examine or enquire about the wheat in store for the defendant; and if so, what was said?

(Question objected to by plffs. att'y.)

Ans. I think Mr. Guyles was over there a few days previous to the fire; it might have been two or might have been four days

previous to the fire, but I do not know that anything was said about the wheat.

Ques. How do you know that the wheat was burned at the time stated heretofore?

Ans. I saw the warehouse burn, and know that the wheat was in the warehouse, and consequently suppose that the wheat was burned.

Cross-examination by pl'ffs' att'y.

Ques. by pl'ffs' att'y. Had you received any order similar to the exhibit A from Mr. Walton relative to the wheat in question before the fire?

Ans. I had not.

Ques. Is it not the duty of the warehouseman, on receiving an order like exhibit A, to furnish and perform all the labor necessary to loading the property embraced in the order on board the vessel furnished by the purchaser free of charge?

Ans. It is the duty of the warehouseman to put it on board the vessel free of charge to the purchaser, unless otherwise directed in the order.

Ques. by pl'ffs' att'y. Is it or is it not customary, in delivering wheat to a purchaser on such an order, or on any other order wherein a given amount of bushels is specified, to weigh out the wheat or grain on delivering it into the vessel?

Ans. It is.

Ques. by pl'ffs' att'y. Does it not frequently happen, that when wheat or other grain has been in store for some time, it falls short a number of bushels on delivery of the amount originally received in store?

Ans. As a general thing it holds out.

Ques. by same. Was it not your custom, on receiving wheat or other property in store, to keep a memorandum of its receipt, and also, if the same was delivered, to minute its delivery on the same stub on which you kept the minute of its receipt?

Ans. It was.

Ques. by same. Will you attach a copy of the memoranda you kept in the case of the wheat in controversy?

Ans. The following appears in the book: "Cleveland, June 9th, 1856. Received in store of T. A. Walton, from boat Convoy, 1,987 $\frac{2}{60}$ bushels wheat—read. Remarks, No. 21, bin 3."

Ques. by pl'ffs' att'y. In the receipt or memorandum which you have copied, is it not customary, when wheat is delivered, to insert in the blank after the word "remarks" how and when the grain or property is delivered?

Ans. It is customary to insert when it is delivered.

Ques. by pl'ffs' att'y. Have you any memorandum on your books of any delivery of the wheat in question?

Ans. I have not.

Question by deft.'s att'y. State whether any separate charge is

made by the warehouseman for the delivery of grain. If not, in what manner does the warehouseman get his pay for the delivery?

Ans. There is no separate charge for delivery, but charge so much per bushel for receiving, storing, and delivering.

Q. by same. How do you know there was 1,987$\frac{2}{8}$ bushels of wheat in the warehouse and stored as stated by you?

Ans. I weighed it in with sealed scales, and weighed it correctly, I have no doubt. That was my weight.

Cross-examined.

Ques. by pl'ffs' att'y. How many times did you see the wheat during the time it was in store?

Ans. I probably saw it nearly every day.

Ques. by pl'ffs' *by* att'y. How do you know that, at the time the warehouse was burned, there was just the amount of wheat in the warehouse that you at first weighed in?

Ans. Because there had been none taken out of that bin, to my knowledge. If there had been any taken out, I should have known it, for I was there all the most of the time.

J. H. GATES.

THE STATE OF OHIO,
Cuyahoga County, ss:

I, Perry Prentiss, a notary public within and for said county, do hereby certify that J. H. Gates was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the foregoing deposition was reduced to writing by me, and signed by J. H. Gates in my presence, and was taken at the time and place specified in the notice hereto attached.

[SEAL.] Witness my hand and official seal this 18th day of July, 1857.

PERRY PRENTISS,
Notary Public for said County.

CLEVELAND, *May* 13, '56.

MR. H. N. GATES:

Please deliver to Messrs. Guyles & Bash two thousand and ten $\frac{2}{8}$ bus. corn.

2,010$\frac{2}{8}$. T. A. WALTON.

The above is a copy of the order referred to in deposition of Gates.

P. PRENTISS, *Notary.*

UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

I, Frederick W. Green, clerk of the circuit court of the United States for the northern district of Ohio, in the seventh circuit, do